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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO et al.,

Defendants;

NON-AGRICULTURAL POOL (OVERLYING) COMMITTEE et al.,

Movants and Appellants,

CHINO BASIN WATERMASTER et al.,

Objectors and Respondents.

E051653

(Super.Ct.No. RCVRS51010)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stanford E. Reichert, Judge. Reversed.

Hogan Lovells US and Allen W. Hubsch for Movant and Appellant Non-Agricultural Pool (Overlying) Committee.

Sheppard, Mullin, Richter & Hampton and Karin Dougan Vogel for Movant and Appellant California Steel Industries, Inc.

Brownstein Hyatt Farber Schreck, Scott S. Slater, Michael T. Fife, and Ryan C. Drake for Objector and Respondent Chino Basin Watermaster.

John J. Schatz for Objector and Respondent Appropriative Pool.

The key question in this case is as much factual as it is legal: Did the Chino Basin Watermaster (the Watermaster) give notice of its intent to purchase certain water? Approximately $4.3 million turns on the answer. The question is complicated by the fact that the purchase was somewhat incestuous — a representative of the seller participated in the administration of the Watermaster, and thus in the Watermaster's planning and decisionmaking regarding the purchase.

The Watermaster is an entity created by a 1978 judgment. That judgment also awarded water rights to various holders and divided those holders into three "pools." One of these is the "Overlying (Non-agricultural) Pool" (the Nonagricultural Pool). Each pool has one or more representatives on the Watermaster's board of directors (the Watermaster Board or the Board).

In 2007, the Watermaster entered into an agreement to purchase water totaling 38,652 acre-feet (af) from the Nonagricultural Pool. The agreement required the Watermaster to give written notice of its intent to purchase by December 2009.

The chair of the Nonagricultural Pool also sat on the Watermaster Board. Thus, he was well aware that the Watermaster was planning to buy the water. In connection with a

board meeting on August 27, 2009, he was provided with an agenda package, including a copy of a written notice of intent to purchase that Watermaster staff had prepared. Moreover, he was present at the August 27 board meeting, when the Board voted to purchase 36,000 af for storage and recovery purposes and to consider what to do with the remaining 2,652 af. Finally, in connection with a Nonagricultural Pool meeting on November 19, 2009, he was provided with, and he was briefed on, the Watermaster's "Plan B" for the purchase and use of the water.

In 2010, however, when the Watermaster tendered payment for the water, the Nonagricultural Pool refused to accept it, claiming that the Watermaster had not given notice.

The trial court ruled that the Watermaster did give notice, by means of the agenda packages and the related discussions at the August 27 and November 19 meetings.

The Nonagricultural Pool[1] and one of its members, California Steel Industries, Inc. (California Steel), appeal. They contend that:

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[1] Technically, the appellant is the "Non-Agricultural (Overlying) Pool Committee," not the Nonagricultural Pool.

Each pool has its own pool committee. The judgment allows each pool committee, as well as each individual pool member, to seek court review of the Watermaster's actions.

In the case of the Nonagricultural Pool, however, every member of the pool is also a member of the pool committee. Accordingly, we see no meaningful distinction between the Nonagricultural Pool and the Nonagricultural Pool Committee.

1. The trial court erred by finding that the purchase and sale agreement did not create an option. (This matters because, at least according to appellants, an option must be exercised in strict accordance with its terms.)

2. The trial court erred by finding that the Watermaster gave notice, because:

a. The notice never became final.

b. The Watermaster did not give notice in the manner specified in the judgment.

c. The Watermaster did not give notice to individual members of the Nonagricultural Pool.

d. Participants in meetings did not actually receive an agenda package; they merely received an email saying that the agenda package was available online.

e. Plan B proposed a procedure that was inconsistent with the purchase and sale agreement.

We agree that the notice never became final. Or, to put it another way, everything that was communicated to the Nonagricultural Pool (or its representatives) about giving notice or purchasing the water came with the caveat that the Watermaster had not yet definitively decided to do either; thus, these communications did not constitute notice of intent to purchase.

We also agree that the purchase and sale agreement, as a matter of law, did create an option. Thus, we cannot apply the doctrine of substantial performance, nor can we

exercise our equitable power to prevent a forfeiture. We need not reach appellants' other contentions. We must reverse the trial court's order.

I

FACTUAL BACKGROUND

A. *The Judgment*.

This action was originally filed in 1975. It sought an adjudication of water rights in the Chino Basin. It was resolved by a judgment entered in 1978.

The judgment provided: "Service of documents. Delivery to or service upon any party . . . of any item required to be served upon or delivered . . . under or pursuant to the Judgment shall be made personally or by deposit in the United States mail, first class, postage prepaid . . . ." (Underscoring omitted.)

The judgment established the Watermaster. It also established three "pools" of parties with water rights:

1. The Appropriative Pool, consisting of public entities and public and private water companies.

2. The Nonagricultural Pool, consisting of industrial and commercial businesses.

3. The Agricultural Pool, consisting of agricultural businesses, particularly dairy farms.

Each pool was given the right to a specified amount of water annually. The Nonagricultural Pool's water rights could not be transferred. However, it had the right to

carry over any unused water in storage. Over the years, the fact that the Nonagricultural Pool was accumulating water, rather than putting it to use, came to be a source of friction.

B. *The Purchase and Sale Agreement*.

In 2000, the parties to the judgment entered into, and the trial court approved, the so-called "Peace Agreement." Among other things, the Peace Agreement allowed the Nonagricultural Pool to transfer water to the Watermaster for purposes of either (1) a storage and recovery program[2] or (2) desalter replenishment. Even after the Peace Agreement, however, the Nonagricultural Pool continued to accumulate water in storage, which continued to cause friction.

In 2007, the parties entered into, and the trial court approved, the "Peace II Agreement." One component of the Peace II Agreement was an agreement for the Nonagricultural Pool to sell water to the Watermaster (the purchase and sale agreement).

The purchase and sale agreement provided that the amount of water to be sold was the Nonagricultural Pool's stored water as of June 30, 2007, minus various deductions. When parties to the judgment sold water to each other, they customarily priced it at 92 percent of the replenishment rate of the Metropolitan Water District of Southern California (the interparty rate). The purchase and sale agreement fixed the price of the water at the interparty rate as of 2007.

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[2] A storage and recovery program was defined as "the use of the available storage capacity of the [Chino] Basin by any person . . . , including the right to export water for use outside the Chino Basin and typically of broad and mutual benefit to the parties to the Judgment[.]"

The "Notice" provision (paragraph C) of the purchase and sale agreement stated:

"Within twenty-four months of the final Court approval of this Agreement . . . , and only with the prior approval of the Appropriative Pool, Watermaster will provide written Notice of Intent to Purchase the [Nonagricultural] Pool water . . . , which therein identifies whether such payment will be in connection with Desalter Replenishment or a Storage and Recovery Program."[3] (Boldface omitted.)

The "Early Termination" provision (paragraph H) stated:

"This Agreement will expire and be of no further force and effect if: Watermaster does not issue its Notice of Intent to Purchase . . . within twenty-four (24) months of Court approval. Upon Watermaster's failure to satisfy the condition subsequent, . . . the [water] will then be made available for purchase by Watermaster and thence the members of the Appropriative Pool . . . ." (Boldface omitted.) However, any such purchase would be at the then-current interparty rate.

The trial court approved the Peace II Agreement on December 21, 2007. Accordingly, the deadline for giving notice under the purchase and sale agreement was December 21, 2009.

Between 2007 and 2009, water prices in Southern California increased substantially. This meant that the interparty rate went up. If the Watermaster were to

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[3] It appears to be conceded that the ultimate purchaser was intended to be the Appropriative Pool and that the Watermaster was acting only as a go-between — possibly to maintain consistency with the provision of the Peace Agreement that the Nonagricultural Pool could transfer water only to the Watermaster.

purchase the water from the Nonagricultural Pool at the 2009 interparty rate, rather than the 2007 interparty rate, it would cost roughly $4.3 million more.

Meanwhile, however, the market rate for water went up even higher. Accordingly, in the first half of 2009, there were discussions about selling the water at auction. The idea was to use part of the auction proceeds to pay for the water and to use the excess auction proceeds — estimated at up to $30 million — to pay for needed facilities improvements.

In June 2009, the Watermaster Board decided to hold the auction. In August 2009, the trial court approved the proposed auction.

C. *Watermaster Structure and Governance*.

The Watermaster, as currently constituted, is an entity, governed by a board of directors. The Watermaster Board has nine members, including representatives of each of the three pools. The Nonagricultural Pool — the smallest pool — has just one seat.

At all relevant times, the Nonagricultural Pool's seat has been held by Vulcan Materials Company (Vulcan). Robert Bowcock is Vulcan's designated representative; Kevin Sage is his designated alternate. Bowcock is also the chair of the Nonagricultural Pool.

Around 2002, the Nonagricultural Pool began holding joint meetings with the Appropriative Pool (joint pool meetings). Generally, either Sage or Bowcock attended these meetings, but he would be the only representative of the Nonagricultural Pool (or, at most, one of two) who was present.

Agendas for Board and joint pool meetings — including the package of supporting documentation — were too large to distribute by email. For example, the agenda package for the August 27, 2009, Watermaster board meeting took up 39.5MB, or 144 printed pages. Accordingly, participants would receive an email notifying them that the agenda was available on the Watermaster's website. However, members of the Board also received a hard copy of the Board's agenda package by mail.

D. *The August 13, 2009, Joint Pool Meeting.*

On August 13, 2009, Sage attended a joint pool meeting. The agenda package for the meeting included a "Notice of Intent to Purchase" (capitalization omitted), along with a staff report.

The notice stated:

"Pursuant to Section C of the Purchase and Sale Agreement . . . , Watermaster hereby provides notice to the [Nonagricultural] Pool that Watermaster intends to . . . purchase [water] for use in a Storage and Recovery Agreement.

"On _____ the Appropriative Pool provided approval for the issuance of this notice. The date of issuance of this notice is December 18, 2009." (Italics omitted.)

At the meeting, the Watermaster's legal counsel explained, "[T]he primary issue is that the notice has to identify how the water will be used." Previously, it had been assumed that 36,000 af of water would be sold at auction; as it turned out, however, 38,652 af was actually available.

After a discussion, the Appropriative Pool voted to use the extra 2,652 af for desalter replenishment, to amend the notice accordingly, and to approve the notice as amended.

E. *The August 27, 2009, Watermaster Board Meeting*.

On August 27, 2009, there was a Watermaster board meeting. Sage attended the meeting.

The agenda package for this meeting, too, included a "Notice of Intent to Purchase" (capitalization omitted), along with a staff report. The notice — as amended and approved by the Appropriative Pool — stated:

"Pursuant to Section C of the Purchase and Sale Agreement . . . , Watermaster hereby provides notice to the [Nonagricultural] Pool that Watermaster intends to . . . purchase [water] . . . for the following uses: 36,000 acre-feet for use in a Storage and Recovery Agreement, and 2,652 acre-feet for use as Desalter [R]eplenishment.

"On August 13, 2009, the Appropriative Pool provided approval for the issuance of this notice. The date of issuance of this notice is December 18, 2009." (Italics omitted.)

At the meeting, the Watermaster chief executive officer (CEO) noted that the Appropriative Pool had decided to use 2,652 af for desalter replenishment. He added, however, that the Fontana Water Company (a member of the Appropriative Pool) had requested reconsideration of whether the 2,652 af could be used for basin replenishment instead.

The Board voted "to approve the Intent to Purchase to [*sic*] 36,000 acre-feet for use in a Storage and Recovery Agreement, and refer the 2,652 acre-feet back to the Appropriative Pool for further consideration and a separate motion . . . ." (Boldface and italics omitted.)

The agenda package for the next board meeting included the minutes of the August 27 meeting. At that meeting, the minutes of the August 27 meeting were approved.

F. *The October 1, 2009, Joint Pool Meeting.*

On October 1, 2009, there was a joint pool meeting. Sage attended the meeting.

The agenda package for the meeting included a staff report recommending that the 2,652 af be used for desalter replenishment. The report explained that "there are essentially three options for disposition of this water" and that none of these would permit the water to be used for basin replenishment. The first two options were to purchase the water pursuant to the purchase and sale agreement and to use it in either a storage and recovery program (the first option) or for desalter replenishment (the second option). The third option was to proceed under the "Early Termination" provision. However, "[i]f the Notice . . . is not issued by December 21, 2009," the report stated, the Nonagricultural Pool members would not be required to provide the water to Appropriative Pool members, and even if they did, the Appropriative Pool members would not be required to use it for basin replenishment.

There was a discussion about the use of the 2,652 af, but the matter was tabled for 30 days.

G. *The November 5, 2009, Joint Pool Meeting*.

Meanwhile, it appeared that potential bidders at the auction were concerned about the practicality of delivering the water. Hence, on October 30, 2009, the Watermaster postponed the auction indefinitely. This made it necessary to find some other way of raising the funds to pay for the water.

On November 5, 2009, there was another joint pool meeting. Sage attended the meeting.

The agenda package for the meeting included a copy of what the parties call "Plan B." Over time, there were several different versions of Plan B. In general, however, Plan B provided that, in lieu of using the proceeds of the auction to pay for the water, the Appropriative Pool would supply the purchase money and would decide later how the water was to be used.

At the meeting, the matter was discussed in closed session (i.e., without Sage). In the closed session, the Appropriative Pool amended Plan B, then approved Plan B as amended.

H. *The November 19, 2009, Board Meeting*.

On November 19, 2009, there was a Watermaster board meeting.[4] Sage attended the meeting.

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[4] The agenda gives an incorrect date for the meeting (October 22, 2009). Bowcock's declaration likewise gives an incorrect date for the meeting (November 29, 2009).

The agenda for the meeting indicated that there would be a report on "Implementation of Plan B for Purchase of . . . Non-Agricultural Pool Water." The agenda package included a copy of Plan B. This Plan B was different from the version of Plan B that had been in the agenda package for the November 5 joint pool meeting. Thus, presumably, it represented Plan B as amended and approved by the Appropriative Pool.

This version of Plan B provided: "By December 21, 2009, Watermaster, under the direction of the Appropriative Pool, will send the Notice of Intent to Purchase pursuant to the Purchase and Sale Agreement." It further provided that, to pay for the water, the Watermaster would levy a special assessment on the members of the Appropriative Pool. "Watermaster shall hold the Purchased Water . . . in trust for the members of the Appropriative Pool . . . ." "If . . . the Purchased Water . . . is sold pursuant to a Storage and Recovery Program, at auction or otherwise," the proceeds would be used to reimburse the members of the Appropriative Pool for the special assessment. "If the . . . Purchased Water . . . has not been utilized in a Storage and Recovery Program or Desalter Replenishment within 3 years . . . , then the Appropriative Pool may elect to distribute the water according to the same formula used to allocate [the special assessment]."

At the meeting, the Watermaster's legal counsel explained that Plan B was "a proposal through which the members of the Appropriative Pool would make arrangements to acquire the water . . . and then conduct an auction in the spring." However, he also "stated that Plan B is now being implemented . . . ." According to the

minutes of the meeting, "[a] discussion regarding holding the water auction in the spring and the philosophy of Plan B ensued."

The matter was on the agenda only as a report, not a business item, and the Board did not approve or take any other action regarding Plan B.[5]

The Watermaster's rules provided, "Watermaster shall obtain Court approval prior to acquiring any water rights in trust for the benefit of the parties to the Judgment."

I. *The January 7, 2010, Joint Pool Meeting.*

On January 7, 2010, at a joint pool meeting, a member of the Nonagricultural Pool asked whether the Watermaster had given notice of intent to purchase, and if so, when. The Watermaster CEO replied, "We will have to get back to you." After the meeting, the Watermaster CEO and legal counsel took the position that notice had been given by way of the agenda package for the August 27 board meeting.

On or about January 17, 2010, the Watermaster tendered the first payment for the water to the members of the Nonagricultural Pool. The Nonagricultural Pool members refused to accept it.

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[5] Also on November 19, 2009, there was an advisory committee meeting, which Sage also attended. Plan B was also in the agenda package for this meeting, and at the meeting, legal counsel gave a similar presentation on Plan B.

II

STANDARD OF REVIEW

"'[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence.' [Citation.]" (*Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 189-190.)

However, "[w]hen the facts are undisputed, the legal significance of those facts is a question of law, and a reviewing court is free to draw its own conclusions independent of the ruling by the trial court. [Citation.]" (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217 [Fourth Dist., Div. Two].)

"Our review of the trial court's interpretation of a contract generally presents a question of law for this court to determine anew. [Citation.] 'The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.'

[Citation.]" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713.)

III

THE WATERMASTER FAILED TO GIVE TIMELY NOTICE

A. *The August 27, 2009, Watermaster Board Meeting*.

The trial court found that the agenda package for the August 27 board meeting, when combined with Sage's participation in the meeting, constituted notice.

For purposes of this opinion, we will assume, without deciding, that:

1. The Watermaster did not have to give notice in the manner specified in the 1978 judgment.

2. The Watermaster did not have to give notice to individual members of the Nonagricultural Pool; notice to Sage (or Bowcock) constituted notice to Vulcan, and notice to Vulcan constituted notice to the entire Nonagricultural Pool.

3. Including a document in an agenda package was sufficient to give Sage (or Bowcock) written notice of it.

Even after we indulge all these assumptions, we conclude that there is a fundamental problem with the trial court's finding. For a given communication to constitute notice, at a minimum, it had to appear that the Watermaster intended to give notice — to apprise the Nonagricultural Pool that it was going to purchase the water. (See *McNeese v. McNeese* (1923) 190 Cal. 402, 405 [notice of rescission]; *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 603 [Fourth Dist., Div. Two]

[notice to cancel or terminate contract].) A person entitled to notice """"is not required to be clairvoyant.""""" (*Stevens v. Department of Corrections* (2003) 107 Cal.App.4th 285, 292.) But no reasonable person who received the agenda package and participated in the meeting would have understood that the Watermaster was, in fact, giving notice of intent to purchase.

The agenda package included a copy of the notice. Moreover, the notice had already been approved by the Appropriative Pool. However, the agenda package also clearly indicated that the notice was not intended to be effective unless and until it was approved by the Board. It was accompanied by a staff report, which stated, "Watermaster staff has prepared a form of the Notice . . . ." It added, "Staff recommends approval of the Notice . . . ."

The only reasonable interpretation of the agenda package was that Watermaster staff was not *giving* notice; it was leaving it up to the Board to decide whether to give notice or not. In other words, the decision to give notice had not yet been made. Thus, the agenda package alone could not be deemed notice.

Moreover, at the August 27 meeting, the board *did not approve the notice*.[6] It voted to approve the *purchase* of 36,000 af for storage and recovery purposes, but it did *not* approve the purchase of the additional 2,652 af. Because the notice recited that the

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[6] In its statement of facts, the Watermaster asserts: "On August 27, 2009, the Watermaster Board approved the Notice . . . ." The only evidence that it cites in support of this assertion, however, is the notice itself.

Watermaster was purchasing both, this could hardly be deemed approval of the *notice*. Moreover, the purchase and sale agreement expressly provided for a sale of "all" (or the "total quantity") of the water. It did not allow the Watermaster to buy just some of the water.[7]

In hindsight, the Watermaster tries to recharacterize the Board's action as a decision to purchase *all* of the water, while postponing the decision on how to *allocate* the 2,652 af. However, that is simply not what the minutes of the meeting say. Moreover, that is not what Watermaster staff understood the Board to have done. In its report for the October 1 joint pool meeting, Watermaster staff evaluated three possible options for the use of the 2,652 af. One was simply not to give timely notice; the staff concluded that, in that event, the 2,652 af would remain the property of the members of the Nonagricultural Pool. Manifestly, the staff did not believe the Board had already decided to purchase the 2,652 af.

Finally, the notice had to specify whether the water would be used for a storage and recovery program or for desalter replenishment. At the August 27 meeting, the Board specifically postponed the decision on how to use the 2,652 af. Thus, even assuming the Board did in fact decide to purchase all of the water, it was not yet in a position to give notice as required.

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[7] Watermaster staff later expressed doubt that the Watermaster could buy just some of the water.

Indeed, despite the best efforts of Watermaster staff, the Watermaster Board never *did* decide how to use the 2,652 af. As California Steel aptly observes, "the fate of the . . . [w]ater was an ever-moving target." On August 27, the Watermaster Board referred the question back to the Appropriative Pool. In connection with the October 1 joint pool meeting, Watermaster staff recommended that the 2,652 af be used for desalter replenishment. At that meeting, however, the Appropriative Pool tabled the matter for 30 days.

Thereafter, the Watermaster canceled the auction, and the Appropriative Pool came up with Plan B. At that point, the question of what to do with the 2,652 af became moot.

We conclude that there is no substantial evidence to support the trial court's finding that the Watermaster gave notice by way of the August 27 agenda packet and meeting.

B. *The November 19, 2009, Watermaster Board Meeting*.

Alternatively, the trial court found that Plan B, along with the discussion of it that took place at the November 19 Watermaster board meeting, also constituted notice.

Once again, however, this fell short of apprising the Nonagricultural Pool that the Watermaster did, in fact, intend to give notice. First and foremost, Plan B itself stated, "By December 21, 2009, Watermaster, under the direction of the Appropriative Pool, *will send* the Notice of Intent to Purchase pursuant to the Purchase and Sale Agreement." (Italics added.) This indicated that Plan B itself was not intended to serve as notice;

notice (if any) would be given some time in the future. Moreover, at the November 19 meeting, the Board was not asked to approve — and did not approve — Plan B.

Admittedly, Sage may have known that the *Appropriative Pool* had approved Plan B. Even if so, this did not mean that the *Watermaster* was necessarily going to proceed to purchase the water. The Watermaster was not simply acting as the Appropriative Pool's agent; giving notice was not simply a ministerial act on the part of the Watermaster. The Watermaster could not give notice unless the Appropriative Pool so directed; however, the purchase and sale agreement did not *require* the Watermaster to give notice if the Appropriative Pool *did* so direct. The purchase and sale agreement specifically provided for the possibility that, even though the Appropriative Pool wanted to purchase, the Watermaster might not give timely notice. In that event, the Appropriative Pool would have to purchase, if at all, under the early termination provision.

Once the plans shifted from an auction to Plan B, the Watermaster's cooperation was even less assured. Plan B required the Watermaster to take significant actions beyond merely giving notice (e.g., levying a special assessment). Thus, it was impracticable without the Watermaster's assent and approval.

In addition, as the Nonagricultural Pool points out, there was a significant inconsistency between Plan B and the purchase and sale agreement. The purchase and sale agreement required any notice of intent to purchase to specify whether the water was being purchased for a storage and recovery program or for desalter replenishment. By contrast, Plan B provided: "If the [purchased] water . . . has not been utilized in a Storage

and Recovery Program or Desalter Replenishment within 3 years . . . , then the Appropriative Pool may elect to distribute the water . . . ."

As this implied, a distribution of water directly to the members of the Appropriative Pool would not qualify as a storage and recovery plan. It would not have "broad and mutual benefit to the parties," as the definition of a storage and recovery plan required. Moreover, even assuming it could so qualify, under Plan B, it might not be known for up to three years whether the water would be used for a storage or recovery plan or for desalter replenishment; thus, it would be impossible to give timely notice specifying either use.

In our view, the question is not whether Plan B deviated from the required *form* of notice. Rather, it is whether a reasonable person would have understood Plan B as intended to serve as notice *at all*. And the answer is no. A reasonable person would have understood it to be exactly what the Watermaster's legal counsel called it — a "proposal" by the Appropriative Pool. Before it could go into effect, and hence before the Watermaster could give notice, at least three things would have to happen. First, the Watermaster would have to approve Plan B. Second, the parties (including the Nonagricultural Pool) would have to negotiate some way around the requirement that the notice specify whether the water would be used for a storage and recovery program or for desalter replenishment. Third, because the Watermaster could not hold water in trust without court approval, the trial court would have to approve Plan B. But none of this ever happened.

The Appropriative Pool argues, "[T]here is no reason why Watermaster or the Appropriative Pool would have desired to pay $4.3 million more for the water by not providing notice in a manner consistent with the Agreement." Actually, one reason is readily inferable from the record: In the wake of the postponement of the auction, the parties had not yet found a way to restructure the purchase in a manner that was consistent with the purchase and sale agreement and with the Watermaster's rules. In any event, whatever the reason, this was a possibility that the parties evidently contemplated and for which the purchase and sale agreement specifically provided.

In sum, then, there is also no substantial evidence to support the trial court's finding that the Watermaster gave notice by way of the November 19 agenda packet and meeting.

IV

THE PURCHASE AND SALE AGREEMENT CREATED AN OPTION

The trial court ruled that the purchase and sale agreement did not create an option. It reasoned that the purchase and sale agreement itself referred to the notice requirement as a "condition subsequent." Appellants contend that this was error.

In part III, *ante*, we concluded that the Watermaster did not give timely notice of intent to purchase. This is true even if the doctrine of substantial performance applies to the *form* of the notice; nothing that the Watermaster said or did prior to December 21, 2009, constituted even minimally substantial performance of the notice requirement. In the trial court, however, the Watermaster argued that the doctrine of substantial

performance applied to the *timeliness* of the notice and, hence, that it gave notice belatedly, but effectively, in January 2010, by asserting that it had already given notice and by tendering payment. We reach the question of whether the purchase and sale agreement gave rise to an option, because it is relevant to whether we can apply the doctrine of substantial performance to the timeliness of the notice.

"[A]n option to purchase . . . is 'a unilateral agreement. The optionor offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises . . . .' [Citation.]" (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 418.) "[E]ven if an option has not yet ripened into a purchase contract, it may nonetheless be irrevocable for the negotiated period of time if sufficient bargained-for consideration is present." (*Id*. at p. 420.)

"[T]he label is not dispositive. Rather, we look through the agreement's form to its substance. [Citation.]" (*Steiner v. Thexton, supra,* 48 Cal.4th at p. 418.) "It is established that express terms such as 'option' . . . are not dispositive in the interpretation of a real estate contract. [Citation.] 'Whether any particular document is . . . an "option" or "an agreement of sale" depends on the nature and terms of the document and the obligation of the parties, regardless of how the parties may label or identify the document. The test is whether . . . there is a mutuality of obligation. If both parties are obligated to perform, it is an agreement of sale; if only one party (the optionor-offeror) is obligated to

perform, it is merely an option.' [Citation.] 'When deciding whether a particular contract is bilateral or unilateral, the courts favor an interpretation that makes the contract bilateral. A bilateral contract immediately and fully protects both parties by binding each to its terms on its execution.' [Citation.]" (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1279.)

As a general rule, an option can be exercised only in the manner specified in the option contract. "It is well settled that when the provisions of an option contract prescribe the particular manner in which the option is to be exercised, they must be strictly followed. [Citations.]" (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 498.) This is because "[a]n option is a contract establishing an irrevocable offer. As with other offers, the offeror may prescribe the mode of acceptance. [Citations.] Where the mode of acceptance is prescribed it must be strictly followed." (*Jenkins v. Tuneup Masters* (1987) 190 Cal.App.3d 1, 7.)

In particular, an option must be exercised within the contractually specified time. "' . . . [T]ime is of the essence of an option to purchase within a specified time, without being expressly made so by the contract. . . . "A limitation of the time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. The rule that in equity time is not of the essence of a contract does not apply to a mere offer to make a contract. An acceptance after the time limited in the offer will not bind the person making the offer, unless he assents to the acceptance so made after it is made."'" (*Rosenaur v. Pacelli* (1959) 174 Cal.App.2d 673, 677.) "To hold otherwise

would give the optionee, not the option he bargained for, but a longer and therefore more extensive option." (*Holiday Inns of America, Inc. v. Knight* (1969) 70 Cal.2d 327, 330.) For these reasons, "it would be inappropriate to grant relief [from forfeiture] under Civil Code section 3275 to permit exercise of an option after the option period had expired." (*Simons v. Young* (1979) 93 Cal.App.3d 170, 185 [Fourth Dist., Div. Two]; accord, *Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 Cal.App.3d 245, 253; *Hendren v. Yonash* (1966) 243 Cal.App.2d 672, 677-678.)

Here, the purchase and sale agreement had all of "'the classic feature[s] of an option.'" (*Steiner v. Thexton*, *supra*, 48 Cal.4th at p. 418.) First, it obligated the Nonagricultural Pool to hold open an offer to sell at a fixed price for a fixed time. (See *ibid*.) Second, the Watermaster had the power to accept the offer, by giving timely notice; however, the Watermaster had no *obligation* to give notice, nor, indeed, to do anything else. (See *id*. at pp. 418-419.)

It has been said that "'[t]he test of whether an instrument is an option or a contract of sale is whether there is such an obligation on the part of the optionee to buy that it can be enforced by specific performance.' [Citations.]" (*Welk v. Fainbarg* (1967) 255 Cal.App.2d 269, 276 [Fourth Dist., Div. Two].) Here, unless and until the Watermaster gave notice, the Nonagricultural Pool could not compel the Watermaster either to give notice or to purchase the water.

The trial court relied on the fact that the purchase and sale agreement itself referred to the giving of notice as a "condition subsequent." Similarly, the purchase and

sale agreement stated in seemingly mandatory terms that "Watermaster *will provide* written Notice," "Watermaster *will pay*," and "Watermaster *will take possession* of the water . . . ." (Italics added.) It then provided, in language consistent with a condition subsequent, "*Early Termination*. This Agreement *will expire* and be of no further force and effect if[] Watermaster does not issue its Notice of Intent to Purchase within twenty-four (24) months of Court approval." (Italics added, boldface omitted.)

As already noted, however, the labels attached by the parties are not controlling.[8] "A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party . . . ." (Civ. Code, § 1438.) Here, the Nonagricultural Pool had no enforceable obligation to deliver any water unless and until the Watermaster gave notice. Likewise, the Watermaster had no enforceable

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[8] The Nonagricultural Pool relies on the fact that the Watermaster has repeatedly referred to the purchase and sale agreement as creating an "option" — including in court filings. What is sauce for the goose, however, is sauce for the gander. These references, too, are a mere label attached by one of the parties; as such, they are not controlling.

The Nonagricultural Pool cites the rule that "'when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.'" (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753.) Here, however, the proffered evidence does not consist of acts or conduct; rather, it consists of mere legal conclusions, which cannot serve as substantial evidence. (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841-842 [Fourth Dist., Div. Two].)

Finally, the Watermaster's references to an "option" in court filings do not rise to the level of judicial estoppel. It does not appear that this characterization was relevant to any issue then before the court; a fortiori, it does not appear that the court relied on it or accepted it as true. (See generally *People v. Castillo* (2010) 49 Cal.4th 145, 155.)

obligation to do anything unless and until it gave notice. Thus, notice was, properly speaking, a condition precedent, not a condition subsequent. This was perfectly consistent with an option. (See *Palo Alto Town & Country Village, Inc. v. BBTC Company*, *supra*, 11 Cal.3d at p. 503 ["from the viewpoint of the optionor, an option is a binding contract subject to the performance of a condition precedent by the optionee"].)

The Supreme Court has given the following example of the difference between an option agreement and a bilateral agreement subject to a condition subsequent: "[A] common form of real estate contract binds both parties at the outset (rendering the transaction a bilateral contract) while including a contingency, such as a loan or inspection contingency, that allows one or both parties to withdraw should the contingency fail. However, withdrawal from such a contract is permitted *only* if the contingency fails." (*Steiner v. Thexton*, *supra*, 48 Cal.4th at p. 419.) A loan or inspection contingency is outside the control of the parties. Here, the only "contingency" was giving notice, and the Watermaster had total discretion to give notice or not.

The Watermaster argues that the purchase and sale agreement has already been partially performed: "[T]he Appropriative Pool consented to the alienability of the surplus Non-Agricultural Pool water . . . , and this element of consideration became binding on the Appropriative Pool . . . ." This is irrelevant to whether the Watermaster's right to purchase additional water upon notice constituted an option. An option is revocable unless it is given for consideration, in which case it becomes irrevocable. Thus, almost by definition, an *irrevocable* option has already been partially performed —

by the buyer. Such partial performance, however, sheds no light on whether the buyer's resulting right to purchase constitutes an option.

More generally, as the Nonagricultural Pool points out, a given *contract* is not necessarily 100 percent bilateral or 100 percent an option. An otherwise bilateral contract may contain an option *provision*. The most common example would be a lease with an option to buy: both parties must at least partially perform the lease aspect before the option aspect can come into play. Here, the Peace II Agreement constituted a package of various interrelated agreements; the purchase and sale agreement was merely one of these. We may assume that the Peace II Agreement includes various bilateral agreements that have been partially or fully performed. We nevertheless conclude that the Watermaster's right to purchase water, on notice, constituted an option.

Accordingly, the doctrines of substantial performance and relief from forfeiture do not apply.

V

WAIVER/ESTOPPEL

In the trial court, the Watermaster argued that, even if it failed to give proper notice, the Nonagricultural Pool waived and/or became estopped to object to the defect.

In this appeal, the Watermaster asserts that the trial court never reached the question of estoppel. However, it does not argue that we should uphold the challenged order on a theory of either waiver or estoppel. It never even suggests that we should remand with directions to the trial court determine whether waiver or estoppel applies.

Actually, the trial court specifically ruled: "[T]he court finds no basis for estoppel in this matter." The Watermaster does not argue that this ruling was erroneous. We deem any challenge to it forfeited.

VI

DISPOSITION

The order appealed from is reversed. The trial court is directed to enter a new order to the effect that the Watermaster did not give timely or effective notice of intent to purchase. Appellants are awarded costs on appeal against respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

MILLER
J.

CODRINGTON
J.